Nos. 06-340 and 06-549

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,
Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF WESTERN URBAN WATER COALITION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

A. Section 7(a)(2) Does Not Apply to Section 402 Delegation Decisions Because Such Decisions Are Non-Discretionary 5

1. The Courts Have Consistently Held that Section 7(a)(2) Applies Only to Discretionary Decision-Making 6

2. FWS Interprets Section 7(a)(2) as Applicable Only to Discretionary Federal Action 7

3. Section 402 Delegations are Non-Discretionary 9

B. Section 7(a)(2) Does Not Apply to Section 402(b) Because There is No Direct Causation Between the Federal Action and the Effects on Protected Species 11

C. Section 7(a)(2) Does Not Implicitly Repeal Section 402, Which Is A Required Result of the Ninth Circuit's Holding 13

D. Remand Is Inappropriate; FWS's Interpretation of Section 7(a)(2) Is Entitled to Deference 17

E. The Practical Effects of Defenders Are Potentially Grave for Water Purveyors in the Western United States 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Cases

American Forest and Paper Ass'n v. EPA, 137 F.3d 291 (5th Cir. 1998) 6, 7, 10

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995) 4, 8

Bennett v. Spear, 520 U.S. 154 (1997) 5

Branch v. Smith, 538 U.S. 254 (2003) 15

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 18

Citizens for a Better Environment v. EPA, 596 F.2d 720 (7th Cir. 1979) 10

Defenders of Wildlife v. EPA, 420 F.3d 946 (9th Cir. 2005) ..... passim

Department of Transportation v. Public Citizen, 541 U.S. 752 (2004) 3, 12

EPA v. California ex rel. State Water Res. Control Bd., 426 U.S. 200 (1976) 10

Ground Zero Center for Nonviolent Action v. U.S. Dep't of the Navy, 383 F.3d 1082 (9th Cir. 2004) 7

In re Operation of the Missouri River Sys. Litig., 421 F.3d 618 (8th Cir. 2005) 7

Marbled Murrelet v. Babbitt, 83 F.3d 1068 (9th Cir. 1996) 6

Morton v. Mancari, 417 U.S. 535 (1974) 15

Natural Res. Def. Council, Inc. v. EPA, 859 F.2d 156 (D.C. Cir. 1988) 10

Oregon Natural Res. Council v. Hallock, et al., Civil No. 02-1650-CO, 2006 WL 1142223 (D. Or. Apr. 24, 2006) 20

Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 962 F.2d 27 (D.C. Cir. 1992) 6, 7

Posadas v. Nat'l City Bank, 296 U.S. 497 (1936) 15

Sierra Club v. Babbitt, 65 F.3d 1502 (9th Cir. 1995) 6

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996) 17

South Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95 (2004) 9

Strahan v. Linnon, 967 F. Supp. 581 (D. Mass. 1997), *aff'd*, 187 F.3d 623, 1998 WL 1085817 (1st Cir. 1998) (unpublished) 7

TVA v. Hill, 437 U.S. 153 (1978) ..... passim

Western Watersheds Project v. Matejko, 456 F.3d 922 (9th Cir. 2006) 7

Statutes

16 U.S.C. §§ 1531-1544 2

16 U.S.C. §1532 4

16 U.S.C. §1533(f) 4

16 U.S.C. §1535(f) 4

16 U.S.C. §1536(a)(2) 2, 5

16 U.S.C. §1536(b) 5

16 U.S.C. §1536(c) 5

16 U.S.C. §1536(d) 5

16 U.S.C. §1538(a) 4

21 U.S.C. § 2021(c) 14

30 U.S.C. § 1235(d) 14

33 U.S.C. §1251(a) 9

33 U.S.C. §1251(b) 9

33 U.S.C. §1311(a) 9

33 U.S.C. §1342(b) 2, 9

33 U.S.C. §1342(c) 10

33 U.S.C. §1344(g)-(k) 14

42 U.S.C. § 300g-2 14

42 U.S.C. § 6926(b) 14

42 U.S.C. § 7661a(d) 14

Regulations

50 C.F.R. § 17.3 4

50 C.F.R. § 202.102 4

50 C.F.R. Pt. 402 5

50 C.F.R. § 402.02 ..... 7, 8

50 C.F.R. § 402.03 ..... 7, 8, 17

50 C.F.R. § 402.09 5

Other Authorities

National Wildlife Federation, et al., Notice of Intent to Sue for Violation of Endangered Species Act—Failure of EPA to Consult on Effect of NPDES Delegation to the Washington State Department of Ecology and Oversight on Threatened Puget Sound Chinook Salmon (Apr. 19, 2006) 20

INTEREST OF AMICUS CURIAE[1]

The Western Urban Water Coalition ("WUWC") is a national association of the municipal water supply utilities that serve most of the largest cities in the western United States. The charter of WUWC members is to provide reliable, high-quality urban water supplies for present and future water consumers. Urban water supplies must be adequate to accommodate growth, sustain people, and maintain and build the economy. WUWC utilities own and operate water supply projects and, in many instances, wastewater treatment facilities for this purpose. WUWC members serve over 35 million urban water consumers in Arizona, California, Colorado, Nevada, Oregon, and Washington.

All WUWC members operate in states that have been delegated authority to issue permits under the Clean Water Act's ("CWA") National Pollutant Discharge Elimination System ("NPDES") program. Many WUWC members currently hold, or are applying for, such permits, which are integral to the operation of their utility systems. If the Court upholds the decision below in *Defenders of Wildlife v. EPA* ("*Defenders*"), 420 F.3d 946 (9th Cir. 2005), it will likely result in severe administrative delays, unnecessary costs, and operational uncertainty, threatening existing and future water utility infrastructure.

Many WUWC members also deliver water to their customers under longstanding allocations of water established

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[1] In accordance with the Court's Rule 37, the Western Urban Water Coalition has received written consent of counsel from all parties to file this brief as *amicus curiae*. The Consents have been filed with the clerk.

by law, treaty, or contractual agreements. The Ninth Circuit decision could cause the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, to trump these long-term water allocation authorities, seriously disrupting the water rights and distribution systems in the western states.

SUMMARY OF ARGUMENT

This case focuses on the relationship between section 402(b) of the CWA, 33 U.S.C. §1342(b), and section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2). Section 402 *requires* EPA to approve state requests to transfer administration of the NPDES permitting program if listed statutory criteria are met. When federal agencies have a non-discretionary duty to act, as EPA does under section 402, section 7(a)(2) does not apply.

The Ninth Circuit construed section 402 and section 7(a)(2) to be in conflict and gave the ESA primacy over the CWA. The Ninth Circuit held that the requirements of section 7(a)(2)—to consult and to insure that listed species are not jeopardized and their critical habitats are not destroyed or adversely modified— can require federal agencies to deviate from express mandates appearing in their governing statutes. To reach this conclusion, the Ninth Circuit relied principally on *TVA v. Hill*, 437 U.S. 153 (1978). *TVA*, however, did not reach the question whether section 7(a)(2) overrides non-discretionary duties set forth in other federal statutes, and it does not support the Ninth Circuit's conclusion.

The Ninth Circuit also erred by ruling that EPA's transfer of NPDES authority is the "cause" of effects on listed species. This result is contrary to the Court's causation

analysis in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), which requires a direct cause-and-effect relationship between the federal action and the prohibited result. The mere transfer of NPDES authority has no direct consequences on listed species or their critical habitat. Even if section 7(a)(2) applies to non-discretionary acts, it is not triggered by NPDES delegation decisions because the decision itself has no effect on listed species or critical habitat.

In addition to creating an irreconcilable conflict between key provisions of the CWA and the ESA, the Ninth Circuit's opinion in *Defenders* thwarts congressional efforts at cooperative federalism. It casts a cloud over many federally-delegated permitting programs, upon which a broad range of entities like the members of WUWC rely, and renders such programs susceptible to injunction. It also calls into question long-settled water rights and allocation schemes in western states. The decision below should be reversed.

ARGUMENT

The Ninth Circuit erred by finding that a conflict exists between section 7(a)(2) and EPA's non-discretionary duty to delegate the administration of its NPDES program to states under section 402 of the CWA. The consultation and no-jeopardy/no-critical habitat destruction provisions of section 7(a)(2) do not apply to non-discretionary actions, such as EPA's section 402 mandate, and, in any case, do not apply when a federal action is not the direct cause of any potential harm to protected species.

Reversing the Ninth Circuit's decision will not have the effect of denying listed species protection under the ESA. To the contrary, extensive and significant protection is still

afforded to ESA-covered species and their critical habitats from the effects of discharges subject to state-delegated permits.[2] Upholding the Ninth Circuit's decision, however, will not only create an irreconcilable conflict between the ESA and the CWA, but could also force federal resumption of NPDES permitting and substantially disrupt comprehensive water planning and management throughout the western states.

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[2] Section 9, for example, provides that it is unlawful for any person to take any listed species of fish and wildlife. 16 U.S.C. § 1538(a)(1). "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." *Id.* § 1532. The "take" prohibition of section 9 goes beyond the reach of section 7(a)(2) and applies not just to federal actions, but to the activities of state governments, corporations, municipalities, individuals, and others. It applies to private as well as public lands. The U.S. Fish and Wildlife Service ("FWS") has further defined the prohibited act of causing "harm" to listed species to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3; *see Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). The National Marine Fisheries Service ("NMFS") has a similar definition for aquatic species. *See* 50 C.F.R. § 202.102. Additionally, section 4 of the ESA requires FWS and NMFS to develop and implement recovery plans for listed species. 16 U.S.C. § 1533(f)(1). Recovery plans provide important conservation guidance to federal agencies, and can serve as a blueprint for removing a species from listing. Finally, most states have their own endangered species laws. To be eligible for federal funding, these state programs must meet standards specified in the federal ESA to ensure adequate protection of listed species. *Id.* § 1535(f).

A. Section 7(a)(2) Does Not Apply to Section 402 Delegation Decisions Because Such Decisions Are Non-Discretionary

Section 7(a)(2) requires federal agencies to "insure" that any action "authorized, funded, or carried out" by the agency will not "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat] of such species." 16 U.S.C. §1536(a)(2). Federal agencies generally fulfill their section 7(a)(2) responsibilities through the consultation process defined by statute and regulation. *Id.* §1536(b)-(d); 50 C.F.R. Pt. 402. If a proposed federal action may affect a listed terrestrial or freshwater species, or its designated critical habitat, the agency consults with FWS to evaluate the action's impacts and minimize any effects. 16 U.S.C. §1536(a)(2); *see Bennett v. Spear*, 520 U.S. 154, 158, 169-70 (1997). When the action affects marine species, the agency consults with NMFS. During consultation, a federal agency and any private permit applicant may not make irreversible or irretrievable commitments of resources that have the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would avoid jeopardy. 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09.

The consultation and no-jeopardy/no-critical habitat destruction requirements set forth in section 7(a)(2) do not apply to every federal action. Instead, section 7(a)(2) is limited to those actions in which a federal agency has discretion and where the federal agency's actions are the direct cause of effects to listed species or their critical habitat.

1. The Courts Have Consistently Held that Section 7(a)(2) Applies Only to Discretionary Decision-Making

This Court held in *TVA v. Hill* that section 7(a)(2) takes priority over *discretionary* federal actions. In that case, TVA exercised its discretion by deciding to locate a federally funded dam on a certain segment of the Little Tennessee River. 437 U.S. at 157. While congressional committees allocated funds for the Tellico Dam project, those appropriations did not mandate construction of the dam in a specific location. *Id.* at 189 ("There is nothing in the appropriations measures, as passed, which states that the Tellico Project was to be completed irrespective of the requirements of the [ESA]. These appropriations, in fact, represented relatively minor components of the lump-sum amount for the *entire* TVA project.") (emphasis in original).

Since *TVA v. Hill*, the courts have consistently considered whether discretionary federal authority exists over the proposed action in deciding whether section 7(a)(2) applies. *See, e.g., American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297-99 (5th Cir. 1998) (no federal discretionary authority over state-issued NPDES permits upon which to base section 7(a)(2) consultation); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1075 (9th Cir. 1996) (FWS's advice to timber company regarding company's compliance with other ESA obligations lacked requisite degree of discretionary federal control to trigger section 7(a)(2)); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) (BLM decision to grant right-of-way pursuant to an existing easement agreement "lack[ed] the discretion to influence the private action"); *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) (holding that FERC lacked discretion under

its enabling statute to impose conditions under section 7(a)(2) to protect listed species).

Those cases that have considered the issue, including other Ninth Circuit decisions, found that section 7(a)(2) does not apply to non-discretionary decision-making. *See, e.g., Western Watersheds Project v. Matejko*, 456 F.3d 922 (9th Cir. 2006) (finding that the duty to consult is only triggered where there is discretionary action); *Ground Zero Center for Nonviolent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (holding that Navy did not need to consult regarding new missile program because Navy lacked discretion; any consultation by Navy would be "exercise in futility"). *See also, In re Operation of the Missouri River Sys. Litig.*, 421 F.3d 618, 630 (8th Cir. 2005) (wildlife protection statutes do not apply where they would render an agency unable to fulfill a non-discretionary duty or exceed its statutory authority); *American Forest and Paper*, 137 F.3d at 297; *Strahan v. Linnon*, 967 F. Supp. 581, 607-08 (D. Mass. 1997), *aff'd*, 187 F.3d 623, 1998 WL 1085817 at *3 (1st Cir. 1998) (unpublished) (section 7(a)(2) does not apply to certificates issued by the Coast Guard based on the agency's limited statutory discretion); *Platte River Whooping Crane*, 962 F.2d at 34. As these decisions confirm, where federal decision-making is non-discretionary, section 7(a)(2) does not apply.

2. FWS Interprets Section 7(a)(2) as Applicable Only to Discretionary Federal Action

Consistent with *TVA* and as other courts have held, FWS interprets section 7(a)(2) to reach only discretionary agency actions. In 1986, FWS adopted regulations that expressly limited section 7(a)(2) to discretionary actions. *See* 50 C.F.R. §§ 402.02, 402.03. The regulations provide that "[s]ection 7(a)(2) . . . appl[ies] to all actions in which there is

discretionary Federal involvement or control." *Id.* § 402.03 (emphasis added). Conversely, where discretion is lacking, as with a transfer of NPDES authority under Section 402 of the CWA, section 7(a)(2) is not applicable.

Another FWS regulation supports the view that it is the statutory authority under which an agency is making a permitting decision, and *not* section 7(a)(2) of the ESA, that determines whether the agency has discretion. *See id.* § 402.02. If the ESA creates jurisdiction and authority independent of the primary statute under which an agency is acting, regulations implementing section 7(a)(2) would not limit the range of alternatives to be considered under section 7(a)(2) to only those falling within the action agency's primary statutory mandate. Section 402.02 of FWS's regulations, however, provides that the Secretary's authority to propose alternatives that avoid jeopardy is just so limited. FWS regulations limit the Secretary's consideration of alternatives under section 7(a)(2) to only those that "can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction." *Id.* Alternatives falling outside the legal authority and jurisdiction established by the action agency's primary statutory mandate cannot be implemented, and thus, there can be no requirement to consult with respect to those alternatives before taking action.

Through its regulations, FWS has construed section 7(a)(2) in a manner that avoids conflicts with other statutes that impose mandatory duties on an action agency. FWS's construction of section 7(a)(2) is reasonable and should be accorded substantial deference. *See Sweet Home*, 515 U.S. at 703 ("The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some

degree of deference to the Secretary's reasonable interpretation."). Under the ESA regulations, as under the case law, section 7(a)(2) does not apply to non-discretionary actions.

3. Section 402 Delegations are Non-Discretionary

Because section 7(a)(2) applies only to discretionary decision-making, it has no application to, and is not in conflict with, NPDES delegation decisions under section 402. The CWA seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, "the [CWA] prohibits 'the discharge of any pollutant by any person' unless done in compliance with some provision of the [CWA]." *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 102 (2004) (quoting 33 U.S.C. § 1311(a)).

Under the CWA, discharges are authorized primarily through the NPDES permitting program. Section 402 "requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *Id.* at 102. Consonant with the statutory policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," 33 U.S.C. § 1251(b), and for states to implement the NPDES permitting program, section 402(b) provides that EPA "*shall approve*" a state's request to transfer administration of the NPDES program to the state "*unless*" the agency determines that the state lacks adequate authority to administer the program in compliance with nine specific criteria. *Id.* § 1342(b)(1)-(9) (emphasis added). None of the criteria for state assumption of the NPDES

program involves prevention of harm to wildlife listed under the ESA.

Once the transfer of NPDES authority is approved, the CWA requires EPA to conduct oversight to determine whether the delegated program is being administered "in accordance with the requirements of this section." *Id.* § 1342(c)(3). If the state's administration of the program is deemed deficient, EPA must demand that the state take corrective action, and if corrective action is not taken, EPA "shall withdraw approval of such program." *Id.*

Courts have consistently construed the nine criteria of section 402(b) as binding and exclusive, removing EPA's discretion to deny approval of State programs that comply with the criteria. *See EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 208 (1976) (EPA "shall approve" transfer when state program is in compliance with guidelines and supported by adequate authority); *American Forest and Paper*, 137 F.3d. at 297 (the language of 402(b) is "non-discretionary"); *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 173-74 (D.C. Cir. 1988) (section 402(b) "commands" EPA to "approve the state permit system" once the statutory criteria are met); *Citizens for a Better Environment v. EPA*, 596 F.2d 720, 722 (7th Cir. 1979) ("If the state program satisfies the statutory requirements of section 402(b) . . . [EPA] must approve the program.").

Each provision of section 402 related to state NPDES programs is set forth in the clearest of mandatory terms: EPA "shall approve" transfer requests; it "shall . . . notify" the state if corrective action is needed; and, if corrective action is not taken, EPA "shall withdraw approval of such program." Because EPA is expressly compelled by law to act consistently with section 402(b), *TVA v. Hill* does not provide

controlling authority, and it does not answer the question whether section 7(a)(2) applies to non-discretionary federal actions, such as delegation of NPDES authority. As noted above, *TVA v. Hill* addressed only discretionary agency action. Reliance on *TVA v. Hill* to answer the question before the Court is therefore misplaced. Instead, cases finding that section 7(a)(2) applies only to discretionary actions support finding that NPDES delegation decisions are not subject to the ESA consultation and no jeopardy requirements.

B. Section 7(a)(2) Does Not Apply to Section 402(b) Because There is No Direct Causation Between the Federal Action and the Effects on Protected Species

Even if the Ninth Circuit were correct in extending section 7(a)(2) to non-discretionary action, EPA's delegation of its NPDES program to states does not cause adverse effects on listed species so as to activate the consultation duty or the prohibitions on jeopardy and critical habitat destruction or adverse modification. Section 7(a)(2) imposes a duty on federal agencies to insure that species are not jeopardized, and that critical habitats are not destroyed or adversely modified, by actions attributable to the agency. Once administration of the NPDES program is transferred, as Congress directed pursuant to section 402, it is the state, and its administration of its own NPDES program, that is directly responsible for the effects flowing from its permitting decisions. A congressional mandate to delegate NPDES program administration to a state does not make EPA responsible for any effects to a species that might occur by virtue of that state's administration of the program. Such effects are not proximately caused by non-discretionary delegation decisions.

This Court's holding in *Public Citizen* supports the conclusion that EPA cannot be considered the legal cause of any effects on listed species resulting from a state's administration of its delegated NPDES permitting authority. *Public Citizen* held that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." 541 U.S. at 770. The question involved was whether the Federal Motor Carrier Safety Administration ("FMCSA") was required under the National Environmental Policy Act "to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers" before deciding whether to approve registration for such trucks. *Id.* at 756. This Court found that the FMCSA's governing statute uses mandatory language that compels the FMCSA to grant registration to any applicant that satisfies certain enumerated criteria. *Id.* at 766. This Court rejected the contention that an agency's action could be considered a "cause of an environmental effect even when the agency has no authority to prevent the effect." *Id.* at 767.

The Ninth Circuit's conclusion that EPA's approval of state requests to transfer NPDES permitting authority "will cause whatever harm may flow from the loss of section 7 consultation on the many projects subject to a water pollution permit, and that harm constitutes an indirect effect of the transfer," *Defenders*, 420 F.3d at 971, is inconsistent with this Court's decision in *Public Citizen*. Here, as in *Public Citizen*, EPA has fulfilled a statutory mandate. Even if effects to species could be traced along the labyrinthine path from the transfer approval to jeopardy to species or destruction of critical habitat, they would be caused by discharges authorized by administering states and not by EPA's non-discretionary approval of the program delegation.

In fact, FWS has concluded that NPDES transfer decisions do not "cause" impacts to species:

> [The] loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to [CWA] permits reflects Congress's decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the [CWA].

Defenders, 420 F.3d at 953 (quoting FWS's biological opinion to EPA).

The plain language of section 402 does not make EPA responsible for effects on protected species flowing from state NPDES permitting decisions. If Congress wants to hold EPA responsible for such effects in the manner the Ninth Circuit found, it has the power to do so. Congress is free to add another criterion for NPDES transfers that would make section 7(a)(2) directly applicable or limit transfers to only those states having state ESA programs that meet specific requirements. It has not done so, and this Court should support that judgment by Congress by reversing the decision below.

C. Section 7(a)(2) Does Not Implicitly Repeal Section 402, Which Is A Required Result of the Ninth Circuit's Holding

Properly construed, section 7(a)(2) does not conflict with section 402. *TVA v. Hill* held that saving listed species is to be afforded "first priority" by federal agencies, 437 U.S. at 185, but it did so in the context of *discretionary* federal

action. As has been found by all other circuits to have considered the issue, section 7(a)(2) is limited to discretionary agency action. Simply put, no conflict arises between section 7(a)(2) and EPA's delegation mandate under section 402 because the former does not apply to the latter.

The Ninth Circuit, however, has forced EPA into an untenable position by ruling that section 7(a)(2) applies to section 402 transfer decisions. On the one hand, through section 402, Congress directs EPA to delegate federal functions to states under a scheme of cooperative federalism.[3] On the other hand, the Ninth Circuit decision insists that EPA must engage in section 7(a)(2) consultation and either deny the transfer application for reasons not included in the applicable criteria or approve the transfer notwithstanding the results of consultation.

The Ninth Circuit's decision creates an avoidable dilemma that has direct consequences for federal and state agencies and permit applicants. By forcing EPA to violate the mandate in section 402 by applying section 7(a)(2), the

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[3] A number of environmental statutes provide for delegation of federal programs, each of which may be at risk under the Ninth Circuit's opinion. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1344(g)-(k) (providing for delegation of dredge and fill permitting authority); Clean Air Act, 42 U.S.C. § 7661a(d) (providing for delegation of emissions permit program); Safe Drinking Water Act, 42 U.S.C. § 300g-2 (providing for delegation of drinking and groundwater protection); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1235(d) (providing for delegation of coal mining permitting authority); Resource Conservation and Recovery Act, 42 U.S.C. § 6926(b) (providing for delegation of hazardous waste tracking program); Atomic Energy Act, 21 U.S.C. § 2021(c) (providing for delegation of authority to regulate certain radioactive waste). Under the Ninth Circuit's reasoning, presumably each of these delegations would be subordinated to their interpretation of section 7(a)(2) obligations.

Ninth Circuit's approach requires a finding that section 7 implicitly repeals section 402. This result is reason enough to reverse the Ninth Circuit's decision. The problem is easily avoided by reading section 7(a)(2) as inapplicable to NPDES delegations under section 402, as all other courts have done and as this Court held. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) (finding that "when two statutes are capable of co-existence," the courts must "regard each as effective").

That the Ninth Circuit's interpretation of section 7(a)(2) creates this conflict, and thereby requires the conclusion that section 7(a)(2) repeals by implication the mandate set forth in section 402(b), argues for reversal. In *TVA v. Hill*, the Court noted that "repeals by implication are not favored." 437 U.S. at 189 (quoting *Morton v. Mancari*, 417 U.S. at 549) (internal quotation marks omitted). Indeed, to find a repeal by implication, "the intention of the legislature to repeal must be clear and manifest." *Id.* (internal quotation marks and citation omitted). The Court summed up the "cardinal rule" as follows:

> [I]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are *irreconcilable*.

Id. at 190 (internal quotation marks and citation omitted) (emphasis added). *See also Branch v. Smith*, 538 U.S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'") (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)).

In the absence of any express statement by Congress that section 7(a)(2) was intended to repeal section 402, the Ninth Circuit should have looked for a means of avoiding conflict and reconciling the statutes. It did not. Neither the ESA nor its legislative history provides any basis for concluding that Congress intended implicitly to repeal a separate legislative mandate, and the doctrine of repeal by implication does not permit such an interpretation.

Indeed, FWS's regulatory construction of section 7(a)(2) reconciles the ESA with the CWA, as well as other statutes that mandate or constrain federal agency action. Yet, rather than affording deference to the agency's interpretation of section 7(a)(2), the Ninth Circuit simply interpreted the FWS regulation as synonymous with the statute it construes. *Defenders*, 420 F.3d at 969 ("In sum, we understand our cases applying the 'discretionary . . . involvement' regulation to interpret that regulation to be coterminous with the statutory phrase limiting section 7(a)(2)'s application to those cases 'authorized, funded, or carried out' by a federal agency."). The Ninth Circuit therefore transformed a statutory scheme from one that was fully reconcilable—and fully consistent with FWS's reasonable construction—into one that directly conflicts with the CWA.

This conflict can and should be avoided. Because the ESA and the CWA are easily reconciled, the ESA should not be construed in a way that necessarily requires a finding of repeal by implication. The Ninth Circuit's approach requires such a finding, and that finding is plainly not supported by the law.

D. Remand Is Inappropriate; FWS's Interpretation of Section 7(a)(2) Is Entitled to Deference

There is no reason to remand this case to EPA. This issue is clearly presented and appropriate for judicial resolution. Remand will only serve to delay and potentially confuse ultimate resolution of the important legal issues presented by this case.

Remand will not resolve the key issue in this case—the proper construction of section 7(a)(2) and whether it applies to section 402 transfer decisions. The answer to that question ultimately turns on FWS's interpretation of section 7(a)(2), not EPA's interpretation. FWS is the agency responsible for implementing section 7(a)(2). FWS has consistently interpreted section 7(a)(2) as inapplicable to non-discretionary federal action. FWS interprets section 7(a)(2) to apply "to all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. § 402.03 (emphasis added.) *See also Defenders*, 420 F.3d at 953 (quoting FWS biological opinion to EPA) ("[T]he absence of the section 7 process that exists with respect to Federal [CWA] permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the [CWA].") Because FWS is the agency responsible for implementing the ESA, FWS's interpretation of the scope of section 7(a)(2) is entitled to substantial deference. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) (stating that deference is accorded "because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess

whatever degree of discretion the ambiguity allows." (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

Although EPA may have vacillated in its understanding of whether section 7(a)(2) was applicable to section 402 transfer decisions in its review of Arizona's transfer request, *see Defenders*, 420 F.3d at 959-62, EPA ultimately resolved the issue consistently with FWS's interpretation. EPA is not the agency to which courts should defer on an interpretation of section 7(a)(2). Remanding the case to EPA will not answer that question. EPA's obligations under section 402 of the CWA appear undisputed by the Ninth Circuit or any party. Nor does the issue whether section 402 transfer decisions are mandatory appear to be challenged; the Ninth Circuit's decision addresses the proper interpretation of section 7(a)(2) of the ESA, not section 402 of the CWA. Thus, a remand for EPA to consider its interpretation of section 402 serves no purpose. The issue is whether EPA can decide that the ESA obligates it to add criteria not enumerated by Congress for NPDES transfer decisions contrary to the interpretation of section 7(a)(2) by the primary agency responsible for administering the statute. That is a question for this Court to resolve based upon FWS's interpretation. EPA's position on the applicability of section 7(a)(2) to section 402(b) transfer decisions is irrelevant, and remand to that agency serves no purpose.

E. The Practical Effects of *Defenders* Are Potentially Grave for Water Purveyors in the Western United States

If the Ninth Circuit's opinion is allowed to stand, the consequences for WUWC members are potentially dire. One

potential effect is the withdrawal of EPA approval under section 402 of the CWA for any already-delegated program for which section 7(a)(2) consultation was not conducted. The Ninth Circuit's conclusion—that sufficient agency discretion exists in the transfer approval process to consider the effects of the action on species and critical habitat—may be expanded to apply equally to EPA's ongoing oversight of the state-run NPDES programs. EPA might then be forced to re-assume permitting authority under section 402(a), despite the lack of funds and resources to absorb these programs.[4] Such a result could affect every state in which WUWC members operate. Far from the cooperative federalism Congress contemplated in section 402, the resumption of federal permitting by EPA would create undesirable administrative delays and jeopardize the potential for comprehensive water planning throughout the western states by disrupting the regulation and management of wastewater treatment facilities.

Further, the likelihood of litigation against both individual permits and permit programs cannot be overstated. If the Ninth Circuit decision is allowed to stand, the courts will most likely confront lawsuits seeking to enjoin future delegation of NPDES permitting authority, as well as already delegated state-administered programs and existing permits. Indeed, several challenges to state-issued 402 permits are already underway or threatened based on the alleged failure to comply with section 7(a)(2) of the ESA. *See, e.g.*,

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[4] The situation in Arizona is illustrative. As noted by FWS in its biological opinion to EPA regarding the transfer of NPDES permitting to the Arizona Department of Environmental Quality ("ADEQ"), EPA's Region 9 has only two full-time staff involved in permitting, planning, and coordination activities for Arizona, while ADEQ has ten staff assigned to water permitting, and is in the process of hiring nine more.

Oregon Natural Res. Council v. Hallock, et al., Civil No. 02-1650-CO, 2006 WL 1142223, *8 (D. Or. Apr. 24, 2006) (challenging NPDES permit issued by Oregon Department of Environmental Quality, alleging failure to comply with section 7(a)(2)); *National Wildlife Federation, et al.*, Notice of Intent to Sue for Violation of Endangered Species Act—Failure of EPA to Consult on Effect of NPDES Delegation to the Washington State Department of Ecology and Oversight on Threatened Puget Sound Chinook Salmon, at 3 (Apr. 19, 2006), *available at* http://www.ecy.wa.gov/programs/wq/links/educate/attachments_to_noi/Nofl001.pdf (last visited Feb. 5, 2007).

Finally, the precedent established by the Ninth Circuit could very well cause the ESA to be applied to the many laws, treaties, and agreements that determine how water will be allocated and, in some cases, used in western states. Those laws, treaties, and contracts are, like the transfer of NPDES authority under section 402, mandatory; they dictate how water from rivers and other sources will be allocated among various users. The urban, residential, and agricultural sectors of much of the west are dependent upon these long-settled water allocation schemes. In many cases, the allocation decisions mandated by these authorities have ESA implications. If the ESA trumps the mandatory elements of the CWA, as the Ninth Circuit has ruled, then these critically important water rights authorities may also be vulnerable to legal challenge for failure to comply with section 7(a)(2). Opening these authorities to ESA application would have highly disruptive and adverse social, economic, and environmental consequences throughout the west. Such an outcome confirms the reasons why section 7(a)(2) must be limited to discretionary agency actions.

WUWC members have devoted considerable resources—and must continue to do so—to meet growing water demands in the western United States. These commitments depend on stability and certainty in the regulatory process and the allocation of water rights. The Ninth Circuit's opinion will likely impact existing and future permits, not only under the NPDES program, but also under other federal statutes containing a congressional mandate to delegate authority to states, and potentially any water-related legal authority that affects species listed under the ESA. This Court should avoid these negative consequences by overturning the Ninth Circuit decision.

CONCLUSION

For the foregoing reasons, amicus curiae WUWC respectfully requests this Court to reverse the Ninth Circuit's decision in *Defenders*. The Ninth Circuit's opinion unnecessarily pits the ESA against other programmatic federal statutes and water allocation authorities by holding that the ESA implicitly overrides other legal mandates. The Ninth Circuit's holding is unnecessary; it is contrary to existing law; and it will lead to uncertainty for any party (including the members of WUWC) that depends upon reliability and predictability in federally-delegated permitting programs.

Respectfully submitted,

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February 20, 2007